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**THE URBAN TRAUMA DRAMA: THE INTERSECTING PATH OF
CRIMINAL JUSTICE AND PUBLIC HEALTH REVEALED DURING
THE COVID-19 PANDEMIC**

JOSÉ FELIPÉ ANDERSON*

ABSTRACT

Our society often operates under the delusion that more incarceration in urban areas will make us safer. Crowded cities and the problems for its inhabitants are not new. Those problems often fall more heavily on minority groups. Failed education, healthcare unavailability, and a lack of decent housing have made it difficult for cities to cope with addiction and crime. The COVID-19 pandemic has made the issues in the criminal system harder to ignore. Decline of major manufacturing jobs in cities like the steel and auto industries removed key opportunities for those seeking to overcome poverty and raise families. Debilitating riots during the late 1960s caused a retreat from the inner city and flight to the suburbs. Drug addiction growing from the 1950s further agitated the challenges of urban life. We should use this crisis as an opportunity to reset and launch new initiatives that have some chance of success.

The so-called “War on Drugs” that began in the 1970s has also had a lasting effect on current approaches to people being unable to get off of the “hamster wheel” of the criminal system. This “Urban Drama Trauma,” as I define it, is the failure of our criminal justice and health care infrastructure to address the root problems of urban living among marginal populations. The opioid crisis of the early 21st-century has also magnified the challenges of major cities in ways that have never been contemplated. Despite these dire circumstances, this crisis may create an opportunity to reset our focus and not repeat the mistakes of the past. Re-directing drug abuse through the healthcare system rather than the criminal system makes sense from an economic and public policy perspective. By addressing the trauma issue directly and focusing on job creation and workforce development for those hampered by the criminal system, we can experience better long-term outcomes.

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I. INTRODUCTION

Our nation is once again in big trouble. The criminal justice system,¹ already fraught with inequality, is now being further exposed by the unanticipated challenge of the COVID-19 epidemic.² As we struggle to engage in police reform,³ sentencing reform,⁴ and bending the arc away from incarceration as a first response⁵ toward the public health arena, we find ourselves at another crossroads, where we should recognize that public health solutions create a more promising opportunity than the criminal justice system.⁶ The intrusion of this

1. The use of the term “Criminal Justice System” has been legitimately called into question in recent years. Recently one of my colleagues re-cast the irony by referring to the “Criminal Legal System,” noting that “justice” seems to have become less of a priority. Comment of Professor Colin Starger, University of Baltimore Law School Faculty discussion, Jan. 7, 2021. *See generally* JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 11 (2017).

2. One court recently described the challenge of the disease in this way: “[i]nfections that are transmitted through droplets,” like COVID-19, “are particularly difficult to control in detention facilities, as 6-foot distancing and proper decontamination of surfaces is virtually impossible.” *United States v. David Harris*, 451 F. Supp. 3d 64, 67 (D.D.C. 2020).

3. NAT’L ACADS. SCIS., ENG’G, & MED., *PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES* 46–47, 122–23 (David Weisburd & Malay K. Majmundar eds., 2018). Perhaps the most well-known hot spots policing model is New York City’s Compstat system, a data-driven program developed in the 1990s to map and respond to concentrations of crime in the city, which later became the norm for departments across the country. *See Compstat: A Crime Reduction Management Tool*, HARVARD KENNEDY SCH., <https://www.innovations.harvard.edu/compstat-crime-reduction-management-tool> (last visited Apr. 24, 2021).

4. *See, e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II*, at 1 (2009). Three-strikes laws were enacted beginning in 1993 by about half the states and the federal government to mandate enhanced sentences on the third “strike”—up to life without the possibility of parole—for people charged with certain repeat offenses. Elsa Y. Chen, *Impacts of “Three Strikes and You’re Out” on Crime Trends in California and Throughout the United States*, 24 J. CONTEMP. CRIM. JUST. 345, 345 (2008); Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 19 (2007). *See also, e.g.*, Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 292 (2007).

5. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 3, 11 (2010).

6. *See generally* DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 104 (2011) (discussing the inclusion of race as a variable in health research and critically analyzing its impact).

unexpected pandemic⁷ has provided us with a fresh opportunity to get it right.⁸ The colossal failure of the so-called war on drugs,⁹ and decades of ignoring the compound problems of urban America, have seated us at the threshold of stagnation in our efforts to solve some of our most daunting quality-of-life challenges.¹⁰ Drug addiction in most major American cities has spread throughout the entire nation, affecting police decisions nationwide.¹¹

Drama, in the colloquial sense, refers to something being trivial and/or troublesome. However, I use the term more so in alignment with the concept of the Greek drama, specifically the Greek tragedy.¹² Poverty is often concentrated

7. “The first study, published today in JAMA Network Open, involved 2,595 patients tested for COVID-19 at a Milwaukee hospital from Mar 12 to 31. Of the 369 patients (59.1%) who tested positive, 218 (59.1%) were [B]lack. Black patients were 5.4 times more likely than those of other races to test positive. Other risk factors included male sex (1.5 times more likely than women to test positive) and being older than 60 years (2.0 times more likely).” Mary Van Beusekom, *Studies Spotlight COVID Racial Health Disparities, Similarities*, CTR. FOR INFECTIOUS DISEASE RSCH. & POL’Y NEWS (Sept. 25, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/09/studies-spotlight-covid-racial-health-disparities-similarities>.

8. For example, one way to reduce social inequity may be to promote policies and resources that allow for social mobility. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 158 (1987) (“It seems . . . the most realistic approach to the problems of concentrated inner-city poverty is to provide ghetto underclass families and individuals with the resources that promote social mobility.”).

9. Commentators have noted the following: “The Nixon Administration officially declared the ‘War on Drugs’ twenty-five years ago. It has continued, at escalating levels, ever since. Today we annually spend \$15 billion in federal funds and \$33 billion in state and local funds to finance this war . . . [H]owever, the Drug War has been an extraordinary failure. Drugs are more available at higher purity and lower prices than they were at the start of the decade.” Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36–37 (1998) (footnotes omitted).

10. In the early 1960s, famed writer James Baldwin vividly described the often-volatile relationship between police and citizens, particularly in ethnic communities: “The only way to police a ghetto is to be oppressive. None of the Police Commissioner’s men, even with the best will in the world, have any way of understanding the lives led by the people they swaggered about in twos and threes controlling. Their very presence is an insult . . . He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country . . .” JAMES BALDWIN, *NOBODY KNOWS MY NAME* 65–66 (1961).

11. *Race and the Drug War*, DRUG POL’Y ALL., <https://www.drugpolicy.org/issues/race-and-drug-war> (last visited Apr. 28, 2021) (discussing that people of color are disparately charged for violations of laws concerning drug possession and low-level sales). Elected public officials have expressed the idea that good police/community relations begin with the attitude of police toward minority citizens. The former Mayor of Detroit, Coleman Young, expressed that view in his autobiography. He wrote, “For nearly twenty years, I had emphasized a firm but respectful style of law enforcement. I had campaigned on that issue and fought over it with the veteran cops. The police department’s attitude adjustment had been the first priority of my first term . . .” COLEMAN YOUNG & LONNIE WHEELER, *HARDSTUFF: THE AUTOBIOGRAPHY OF COLEMAN YOUNG* 321 (1994).

12. A staple of the theatrical genre was the presentation of mortals placed in no-win situations by the pantheon of Greek gods. Mark Cartwright, *Ancient Greek Theatre*, WORLD HIST.

in urban communities, and this combines with the drama created by the trauma in those communities.¹³

While gentrification has continued to create economic refugees, the contemporary strategies of urban revival combined with the decades-long adventure of suburban flight, as solutions to the American city's poverty problem, are collapsing simultaneously.¹⁴ The pandemic has only exacerbated the well-documented trend of increasing economic inequality in the United States.¹⁵ Many people in the country find themselves closer to unemployment or poverty than they are to economic stability and social mobility.¹⁶

I do not intend to suggest that such challenges are restricted to urban communities. There is ample evidence that rural communities encounter similar difficulties.¹⁷ Public perceptions that exist against welfare recipients, through stereotypes about alleged lack of personal responsibility, further complicate the issue of economic inequality and make political solutions more difficult to reach.¹⁸ For example, although creative use of safe drug injection facilities have been demonstrated to reduce certain health care challenges outside this country, the United States Department of Justice has been unequivocal in its position that

ENCYCLOPEDIA (July 14, 2016), https://www.worldhistory.org/Greek_Theatre/. In the modern American city, we can see these same dynamics at play: the impoverished living in the city are placed in no-win situations not by a pantheon of gods, but a panoply of failed social institutions. *"The Wire": David Simon Reflects on His Modern Greek Tragedy*, VARIETY (Mar. 7, 2008, 7:31 PM), <https://variety.com/2008/tv/news/the-wire-david-21043/> ("It was a Greek tragedy done in a modernist urban way, with the city as the main character[.]").

13. Ironically, minorities and the poor are still overwhelmingly the victims of crime and poverty. Some scholars have reminded us that problems of crime are "closely intertwined with issues of discrimination." See Peter E. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1698 (1993).

14. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 800–01 (1993). See also Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. POVERTY & POL'Y 33, 35 (2006) ("[T]he building code's historical development was often keyed particularly to urban health and safety concerns."). In the early nineteenth century, poor planning combined with an influx of urban residents contributed to the emergence of squalid slums, which were "filthy, unlighted, overcrowded, and dank." *Id.*

15. Zia Qureshi, *Tackling the Inequality Pandemic: Is There a Cure?*, BROOKINGS (Nov. 17, 2020), <https://www.brookings.edu/research/tackling-the-inequality-pandemic-is-there-a-cure/>.

16. See *id.*

17. KIM PARKER ET AL., PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN, AND RURAL COMMUNITIES 7 (2018).

18. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 795 (2007) ("Welfare stereotypes . . . do apply to low-income taxpayers because even though the low-income taxpayer credit was created as an *alternative* to welfare, low-income taxpayers are viewed as lazy former welfare recipients who work because they have to and will lie and cheat in order to line their pockets with government money." (emphasis in original)).

they are illegal under the federal Controlled Substances Act.¹⁹ Such hardline approaches may make expensive social problems like opioid addiction even more costly.²⁰

My focus, however, is on large urban centers with multi-member police forces and cumbersome criminal justice infrastructures that make law reform more difficult. The sheer volume of police-citizen contact amplifies implicit bias in urban communities.²¹ More blatant acts of police violence have been decreasing trust in law enforcement.²² Ideas like “broken windows policing,”²³ which became popular in New York City and focused on arresting people for low-level crime,²⁴ have made the police the enemy of urban people.²⁵ In some

19. Amber A. Leary, *A Safe Harbor in the Opioid Crisis: How the Federal Government Should Allow States to Legislate for Safe Injection Facilities in Light of the Opioid Public Health Emergency*, 84 BROOK. L. REV. 635, 640 (2019).

20. Opioid-related healthcare, criminal justice, and lost productivity cost the U.S. about \$111 billion in 2013. See CHRIS CHRISTIE ET AL., THE PRESIDENT’S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS: FINAL REPORT 31 (2017). Such policy clashes over what conduct is criminal, when combined with racial stereotypes about poor communities, result in bad policy and lack of political will to treat urban trauma as anything other than an issue for criminal punishment, or result in responses that suggest those struggling simply “get what they deserve.”

21. E.g., Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 142–46 (Angela J. Davis ed., 2017). Because most actions occur without conscious thought, implicit biases have a significant influence over people’s behavior. *Implicit Bias*, PERCEPTION INST., <https://perception.org/research/implicit-bias/> (last visited Apr. 10, 2021). See also Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 800–01 (2012).

22. See *Gutierrez v. City of San Antonio*, 139 F.3d 441, 443 (5th Cir. 1998) (police misconduct upon a citizen in urban neighborhood, “hog-tying,” referring to placing a person on their stomach, handcuffing them, restraining their legs, and then connecting the legs and arms together); *Vizbaras v. Prieber*, 761 F.2d 1013, 1015 (4th Cir. 1985) (“cradle cuff”).

23. In 1982, George L. Kelling and James Q. Wilson wrote an article entitled *Broken Windows*, which purported to offer a policing strategy that would help police to serve the needs of communities. This strategy empowered officers to focus on “order maintenance.” The authors based the strategy outlined in *Broken Windows* on the premise that crime and disorder are linked, and therefore increasing order through greater police presence in neighborhoods would prevent crime and make residents feel safer. In theory, this strategy would empower officers to restore a community through the policing of low-level offenses. George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>. In practice, “broken windows” policing is an antiquated attack on the poor that the criminal justice system needs to replace with real solutions.

24. See NAT’L ACADS. SCIS., ENG’G, & MED., *supra* note 3, at 70–73, 163, finding that broken windows policing has little impact on public safety.

25. See David Cole, *Unequal Justice: Although the American Criminal Justice System Has a Long History of Racial Bias, the United States Is Only Now Starting to Take an Honest Look at the Problem*, BALT. SUN (May 16, 1999), <https://www.baltimoresun.com/news/bs-xpm-1999-05-16-9905190402-story.html>. “Often, the patterns of harassment were more than isolated incidents of

instances, police intimidation²⁶ has yielded examples of outright criminal conduct by police in these already beleaguered communities.²⁷ Without substantial changes, this dynamic is likely to continue.²⁸ Lurking amidst the despair is the stunning health care inequality among African Americans, which suggests a true public health crisis in major cities among minority communities.²⁹ COVID-19 has made these issues in the criminal system hard to ignore. Under the significant pressure of the pandemic, it was confirmed that all social stakeholders, including government, private sector industry, health care, and policing infrastructures, demonstrated significant flaws. Those flaws indicate the absence of meaningful solutions to decades-long urban problems.

sidewalk justice dispensed by rogue cops. In fact, they reflected a wide-spread pattern of police abuses rooted in departmental policies. In some cases, police departments created roving task forces that swooped down on high-crime neighborhoods and conducted indiscriminate street stops and searches.” *Id.*

26. *See, e.g.*, PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 59 (2017) (“A cop friend of mine invented a game that tells you everything you need to know about the extraordinary consequences of Whren. The cop takes my law students on ride-alongs in his squad car so they can see what it’s like to be a police officer. The game is called Pick a Car. My friend tells the students to pick any car they see on the street and he will legally stop it. He says that he can follow any driver and within a few blocks he or she will commit some traffic infraction. Then he turns on his siren and flashing lights. He can order the driver and passenger to exit their vehicle. He can pat them down if he feels like his safety is threatened.”)

27. *See, e.g.*, Press Release, U.S. Dep’t of Just., Former Baltimore City Police Gun Trace Task Force Detective Sentenced to 12 Years in Federal Prison for Racketeering Conspiracy (May 28, 2019), <https://www.justice.gov/usao-md/pr/former-baltimore-city-police-gun-trace-task-force-detective-sentenced-10-years-federal> (officers engaged in outright criminal conduct, including robbing civilians and filing false reports). In Baltimore, police corruption and intimidation reached new heights with the conduct of a group of undercover officers who were known as the Drug Trace Task Force. After years of complaints, several of them were indicted. *Id.*

28. *See* L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 269 (2012) (“[O]fficer character is an important component to creating an institutional environment that facilitates the protection of citizen privacy against arbitrary intrusion.”) [hereinafter *Cognitive Bias*]; L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2962 (2015).

29. “Using health disparities as a measure of injustice reveals that the United States is a very unjust society. Imagine if every single day a jumbo jet loaded with 230 black passengers took off into the sky, reached a cruising altitude, and then crashed to the ground killing all aboard. According to former Surgeon General David Satcher, that is the impact caused by racial health disparities in the United States. That image represents the number of Black Americans—totaling 83,570—who would still have been alive in 2002 when he gathered the statistics, if their life expectancy was the same as that of [W]hites. In one generation, between 1940 and 1999, more than four million Black Americans died prematurely relative to [W]hites.” (footnotes omitted). Dorothy E. Roberts, *The Most Shocking and Inhuman Inequality: Thinking Structurally About Poverty, Racism, and Health Inequities*, U. MEM. L. REV. 167, 192 (2018).

II. THE DESPERATION OF CITIES

It has long been observed that cities are full of desperation regarding criminal justice issues.³⁰ Although they are hubs of human energy and commerce, the sheer volume of people who live in cities amplifies the challenges that require examination in the rugged urban landscape. Recently, the Baltimore City Council attempted to address the serious issue of urban trauma with groundbreaking social reform legislation, The Baltimore City Trauma-Responsive Care Act. Its core purpose was to establish “. . . certain duties of the Task Force; requiring certain agencies to designate certain individuals to undergo formal training in trauma-informed care and to perform certain other duties related to ensuring that certain agencies are delivering services in a manner consistent with best practices in trauma-informed care”³¹ This legislation is a great start to recognizing a problem deeply imbedded in the very infrastructure of our government, that the impact of trauma on urban communities often goes ignored.³²

This urban trauma is in large part the failure of our criminal justice and health care infrastructures³³ to address the root problems of urban living among minority populations. Crowded cities, and the problems they bring for their inhabitants, are not new.³⁴ Those problems, which often fall more heavily on

30. A report of the Ferguson, Missouri Police Department found widespread discrimination in policing: “Ferguson’s approach to law enforcement both reflects and reinforces racial bias, including stereotyping. Ferguson’s law enforcement practices overwhelmingly impact African Americans. Data collected by the Ferguson Police Department (FDP) from 2012 to 2014 shows that African Americans account for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests made by FPD officers, despite comprising only 67 percent of Ferguson’s population.” U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF FERGUSON POLICE DEP’T 5–6 (2015).

31. City of Balt. Council Bill 19-0410 (Balt. 2019).

32. For example, the Adverse Childhood Experiences (ACEs) Study and the robust medical research that has followed over the past twenty years demonstrate that childhood trauma has profound effects on brain development and, consequently, negative effects on adult behavior. Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 AM. ACAD. PEDIATRICS e232, e236 (2012).

33. See F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 169–70 (2013) (providing an insightful discussion on the structural economic and racial disparities that currently exist in our nation, which gets at the meaning of the phrase “when America gets a cold, Black America gets the flu”).

34. One scholar has insightfully commented: “In the promotion of social rights[,] . . . it is important to appreciate that the poor and the working classes of all racial groups struggle to make ends meet, and even the middle class has experienced a decline in its living standard. Indeed, Americans across racial and class boundaries worry about unemployment and job security, declining real wages, escalating medical and housing costs, the availability of affordable childcare programs, the sharp decline in the quality of public education, and crime and drug trafficking in their neighborhoods.” WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 204–05 (1996).

minority groups, have amplified the poverty concentration in such areas.³⁵ Failed education, healthcare unavailability, and other poor living conditions have made it even more difficult for cities to cope with addiction and crime.³⁶ Often, the legal system projects negative assumptions on urban residents simply because they cannot escape their circumstances.³⁷

One example of this is public education, which started out as a grand idea to grant access to the opportunities of education to many people.³⁸ Mandatory public-school attendance was seen by many as a way to break the cycle of poverty among immigrants and minorities who would come to the city for better opportunities.³⁹ After the Supreme Court decided *Brown v. Board of Education*, requiring the abolition of segregation in public schools,⁴⁰ the nation's approach to grade school changed forever. Just like resistance to integrated housing, the

35. Justin Wolfers, *Growing Up in a Bad Neighborhood Does More Harm Than We Thought*, N.Y. TIMES (Mar. 25, 2016), <https://www.nytimes.com/2016/03/27/upshot/growing-up-in-a-bad-neighborhood-does-more-harm-than-we-thought.html> (noting that research confirms neighborhoods can act as a major determinant of one's health as well as economic success).

36. It has been suggested that moving students out of city poverty when they are young may have long term benefits. *See, e.g.*, Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855–56 (2016) (studying the Department of Housing and Urban Development's Moving to Opportunity experiment's long-term impacts and finding a positive effect on college attendance and income for people who moved before age thirteen). *See also* Avelardo Valdez, *Aggressive Crime, Alcohol and Drug Use, and Concentrated Poverty in 24 U.S. Urban Areas*, 33 AM. J. DRUG & ALCOHOL ABUSE 595, 600, 602 (2007).

37. The term "criminalization of poverty" is frequently used by advocates for the homeless poor to describe ordinances, such as panhandling statutes and anti-loitering statutes, and selective enforcement targeting homeless individuals. *See, e.g.*, David M. Smith, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 487–88 (1994).

38. Legendary educator Dorothy Height once said: "The surest path to success is through education in a society increasingly based in science and technology. Education is key." DOROTHY HEIGHT, *OPEN WIDE THE FREEDOM GATES* 295 (2003). Thomas Jefferson believed that public schools should be provided so average citizens could be informed and productive members of American society. *See* JOEL SPRING, *THE AMERICAN SCHOOL 1642-1985: VARIETIES OF HISTORICAL INTERPRETATION OF THE FOUNDATIONS AND DEVELOPMENT OF AMERICAN EDUCATION* 39–40 (1986).

39. AM. PSYCH. ASS'N PRESIDENTIAL TASK FORCE ON EDUC. DISPARITIES, ETHNIC & RACIAL DISPARITIES IN EDUCATION: PSYCHOLOGY'S CONTRIBUTIONS TO UNDERSTANDING & REDUCING DISPARITIES 9, 10 (2012). While five percent of White children grow up with a parent who did not graduate from high school, twelve percent of Black and forty percent of Latinx children grow up with a parent who did not graduate from high school. *Id.* at 17.

40. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954). One critic of the *Brown* decision observed that "[i]n basing the *Brown* doctrine in a sweeping decision purely within the purpose and function of public school education, the courts committed a beneficent act analogous to freeing long-term convicts from prison without adequate resources to survive in the free world." HAROLD CRUSE, *PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY* 67–68 (1987).

idea of integrating schools caused many years of strife in the city, leading to the decline of urban schools.⁴¹ Thus, urban children are disproportionately impacted.⁴²

Crowded and inferior housing has always been a problem of American cities.⁴³ In every era, cities have been the focal point of jobs and mobility. People concentrate in cities because of opportunity.⁴⁴ Even though they are crowded, support networks are usually closer. Transportation might be more readily available.⁴⁵ The ability to walk to work may be more available for some.⁴⁶ These benefits of living and working in a city certainly were present when American industrialization was at its height.⁴⁷ Beginning in the late nineteenth century, the

41. *E.g.*, Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 Boycott—In New York City*, WNYC (Feb. 3, 2016), <https://www.wnyc.org/story/school-boycott-1964/>. See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 57 (1992) (“Black neighborhoods seem impoverished today not so much because they are segregated, as because most blacks with jobs have moved out.”).

42. One news report has noted, “According to data from The Child and Adolescent Health Measurement Initiative, 56% of Baltimore’s children have experienced one or more major traumatic events. Left unaddressed, each of these ‘adverse childhood experiences,’ can have a devastating impact on health outcomes and lead to an increased risk of addiction, incarceration and other risky behaviors. Baltimore’s children are growing up in an epidemic of violence, yet our response has reliably prioritized policing at the expense of prevention. The students ended their testimony with a call to action. A call for the adults in their lives to no longer ignore or exacerbate their pain. A call for teachers, administrators and legislators to provide the opportunities and resources they need to heal. The time is now for Baltimore to become a ‘trauma-responsive city’[.]” Zeke Cohen, *The Time Is Now for Baltimore to Become a ‘Trauma-Responsive City’*, BALTIMORE SUN (July 22, 2019, 6:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0722-trauma-act-20190722-ayl64qnothvpkidtojjur43xa-story.html>.

43. See Mindy Thompson Fullilove, *Root Shock: The Consequences of African American Dispossession*, 78 J. URB. HEALTH 72, 72–73 (2001).

44. See Sam Roberts, *Projections Put Whites in Minority in U.S. by 2050*, N.Y. TIMES (Dec. 17, 2009), <https://www.nytimes.com/2009/12/18/us/18census.html> (“[I]f immigration were to merely slow, rather than stop, on-Hispanic [W]hites, who now account for nearly two-thirds of the population, would become a minority by 2050 If the pace of immigration increases, that benchmark could be reached as early as 2040.”).

45. ROBERT D. BULLARD ET AL., *SPRAWL CITY: RACE, POLITICS, AND PLANNING IN ATLANTA* 3–4 (2000) (“Apartheid-type employment, housing, development, and transportation policies have resulted in limited mobility, reduced neighborhood options, decreased residential choices, and diminished job opportunities for African American and other people of color who are concentrated in cities.”).

46. Richard Florida, *The Great Divide in How Americans Commute to Work*, BLOOMBERG CITYLAB (Jan. 22, 2019, 11:46 AM), <https://www.bloomberg.com/news/articles/2019-01-22/how-americans-commute-to-work-in-maps>.

47. See Allan Pred, *Industrialization, Initial Advantage, and American Metropolitan Growth*, 55 GEOGRAPHICAL REV. 158, 158 (1965) (discussing how the benefits of increased manufacturing opportunities became nearly synonymous with the rise of cities in America). As a result of increased opportunity, such as that once offered by cities, disadvantaged individuals may achieve social and geographical mobility. See WILSON, *supra* note 8 (“It seems . . . the most realistic approach to the

growth in manufacturing industries helped fuel a robust growth in urban America.⁴⁸ Toward the end of the twentieth century, however, those large manufacturing hubs began to deteriorate, and the cities they supported deteriorated along with them,⁴⁹ resulting in disproportionately high rates of unemployment for Black workers compared to White workers.⁵⁰

A. *History of Racial Discrimination in Housing*

Alongside urban deterioration were the race-based restrictions legally imposed in urban housing, which set up a racial caste system in many places.⁵¹ Racial restrictions began taking shape in the beginning of the twentieth century.⁵² Major cities began to impose such restrictions to determine what types of people could move into certain neighborhoods.⁵³ The idea spread across America. Racial segregation of neighborhoods in cities resulted in differences in economic value and diminished the worth of minority communities.⁵⁴ It took a decades-long battle in the Supreme Court of the United States to remove the

problems of concentrated inner-city poverty is to provide ghetto underclass families and individuals with the resources that promote social mobility.”).

48. *Pred*, *supra* note 48.

49. WILSON, *supra* note 8, at 180–81. It has been noted: “The decline of the manufacturing sector in the U.S. economy is even more evident looking back further in time. In 1998, there were 18.1 million manufacturing jobs, 11% of total jobs and 5.6 million more than in 2018. In addition, while total GDP increased 47% from 1998 to 2018, the manufacturing sector increased just 5%. In Michigan, a state known for automotive production, manufacturing’s share of the state’s GDP dropped from 25% in 1998 to 15% in 2009” *The Declining Economic Impact of Manufacturing*, U.S. NEWS (Dec. 18, 2018, 6:00 AM), <https://www.usnews.com/news/elections/articles/2019-12-18/the-declining-economic-impact-of-manufacturing-no-longer-made-in-america>.

50. Drew DeSilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RSCH. CTR. (Aug. 21, 2013), <https://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>.

51. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 122 (2017).

52. *E.g.*, Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 299–300 (1983) (discussing in detail the circumstances and origin of Baltimore, Maryland’s racial zoning ordinance requiring city streets to have a designation by race).

53. *E.g.*, *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (detailing a challenge in the District of Columbia, during which the court sustained racial covenants as part of freedom of contract and disposal of property); *City of Richmond v. Deans*, 37 F.2d 712, 713 (4th Cir.), *aff’d*, 281 U.S. 704, 704 (1930); *Tyler v. Harmon*, 160 La. 943, 944 (La. 1926) (permitting Negro residence only upon consent of majority of neighborhood), *rev’d*, 273 U.S. 668, 668 (1927).

54. According to the Urban Institute, “Black Americans have historically lagged behind their [W]hite counterparts in several major wealth-building measures, such as household wealth, retirement savings, and homeownership.” Serena Lei, *Nine Charts About Wealth Inequality in America (Updated)*, URB. INST., <https://apps.urban.org/features/wealth-inequality-charts/> (last updated Oct. 15, 2017).

legal impediments that hindered minorities seeking access to housing in many communities.⁵⁵ Decline of major manufacturing jobs in cities like the steel and auto industries,⁵⁶ for example, limited opportunity for those seeking to overcome poverty and raise families. Debilitating riots during the late 1960s⁵⁷ caused a retreat from the inner city and flight to the suburbs.⁵⁸ Drug addiction growing from the 1950s further agitated the challenges to urban life. The war on drugs that began in the 1970s has had a lasting effect on current approaches to people being able to get off the “hamster wheel” of the criminal justice system⁵⁹ and stretches to the modern day. This has led to further distraction from getting needed physical and mental health services⁶⁰ for people trapped in a decaying urban environment. Courts are highly unlikely to intervene.⁶¹ Only occasionally has the federal government even attempted to take official legal action to remove barriers in housing discrimination.⁶²

Ultimately, the United States Supreme Court ruled in *Shelley v. Kraemer* that a state’s use of restrictive covenants excluding African American families from specific private neighborhoods was no longer constitutionally permissible.⁶³ This historic litigation was led by a brilliant African American lawyer named Charles Hamilton Houston who, along with Thurgood Marshall, developed a comprehensive approach to changing the law.⁶⁴ Even though

55. See Power, *supra* note 53, at 310–13.

56. ANTERO PIETILLA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 221 (2010).

57. David R. Francis, *How the 1960’s Riots Hurt African-Americans*, THE DIGEST (Sept. 2004), <https://www.nber.org/digest/sep04/how-1960s-riots-hurt-african-americans>.

58. W. EDWARD ORSER, BLOCKBUSTING IN BALTIMORE: THE EDMONDSON VILLAGE STORY 18–19 (1994).

59. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1560, 1561 (2004) (explaining that rather than reducing state incapacitation of offenders, diversion programs may instead be widening the net and simply changing types of state-imposed incapacitation of offenders); Joseph Powderly, *International Criminal Justice in an Age of Perpetual Crisis*, 32 LEIDEN J. INT’L L. 1, 5 (2019).

60. Kurt L. Schmoke, *Forging a New Consensus in the War on Drugs: Is it Possible?*, 10 TEMP. POL. & C.R. L. Rev. 351, 356 (2001) (Kurt Schmoke examining his decisions as Mayor of Baltimore to deal with drug addiction as a public health issue, using examples related to mandatory sentencing and the current policy on the war on drugs).

61. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 26–29 (1973) (reaffirming the Supreme Court’s prior holdings that “wealth discrimination alone [does not provide] an adequate basis for invoking strict scrutiny”).

62. One instance of eliminating discrimination in public housing is in the area of the disabled. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP’T OF JUST. (May 14, 2004), <https://www.justice.gov/crt/us-department-housing-and-urban-development> (prohibiting housing providers from discriminating against people with disabilities).

63. *Shelley v. Kraemer*, 334 U.S. 1, 19, 23 (1947).

64. It is clear that Charles Houston was the key driving force among the lawyers arguing the restrictive covenant cases. He attended meetings of a group of “Lawyers and Consultants on

Shelley was seen as a victory for equal justice under the law,⁶⁵ the biggest discriminator in housing was the United States government itself. It actually encouraged redline restrictions⁶⁶ on housing in minority areas so that financing the purchase of homes became nearly impossible for many.⁶⁷

In *Shelley*, an African American family had purchased a home by warranty deed on August 11, 1945, from Josephine Fitzgerald, who was unaware of the restrictive covenant applicable to the property's neighborhood.⁶⁸ On October 9, 1945, the Kraemers, who also owned property subject to the covenant, filed suit against the Shelleys, seeking to prevent them from taking possession of the property and asking the court to divest them of ownership, revesting title in the original grantor or another party.⁶⁹ The trial court denied the claim because the parties to the agreement intended that it would not take effect unless all property owners within the district signed on.⁷⁰ That had not been accomplished.⁷¹ The Kraemers appealed, and the Shelleys moved in.⁷² The Supreme Court of Missouri reversed the trial court's decision and ordered the court to grant the

Methods of Attacking Restrictive Covenants." GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 177-78 (1983). Houston expressed his view on the effect of racial covenants in an editorial during the 1940s, writing: "[T]he device of racial covenants not only constricts colored people within urban ghettos, but is used to segregate and exclude other elements from decent housing. All minority groups such as Indians, Japanese-Americans, Orientals, Jews, Assyrians, etc., etc., are hit from time to time. The traditional policy of America, as the melting pot of nations, has been replaced by a racially restrictive policy of segregation, restriction and ghettoization. These covenants are not confined to city property. Practically every bit of desirable beach or vacation property is plastered with restrictive covenants against one group or another." Charles H. Houston, Editorial, *The Highway*, BALT. AFRO-AM., Oct. 11, 1947, at 4.

65. *Shelley*, 334 U.S. at 19, 23 (voiding private agreements that prevented the sale of real property to African-Americans, explaining that the enforcement of such a racially restrictive covenant by state courts constitutes state action violating the Equal Protection Clause of the Fourteenth Amendment). Justices Stanley Forman Reed, Robert Jackson, and Wiley Rutledge took no part in *Shelley v. Kraemer*. Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 761 (1989). They offered no reason, although some have assumed that it was because they owned property touched by racially restrictive covenants. *Id.*

66. "Redlining" means the "removal of financial resources from a community that is perceived to be high-risk." David Evan Cohen, *The Community Reinvestment Act: Asset or Liability?*, 75 MARQ. L. REV. 599, 601 (1992).

67. E.g., Henry W. McGee, Jr., *Seattle's Central District, 1990-2006: Integration or Displacement?*, 39 URB. LAW. 167, 169, 214-15 (2007) (describing gentrification and redlining in a traditional minority neighborhood that encouraged the transition to a predominantly White enclave).

68. *Shelley*, 334 U.S. at 5.

69. *Id.* at 6.

70. *Id.*

71. *Id.*

72. *Id.*

Kraemers' requested relief, holding that the agreement was effective and that its enforcement violated no constitutionally guaranteed rights.⁷³ The court's ruling served not only to enforce the restriction with respect to use and occupancy of the properties covered by the covenants, but actually required divestment of the title of any property owner who violated the restriction.⁷⁴ Subsequently, eighty percent of the lot owners on the block executed similar agreements.⁷⁵ The restrictive covenant gave White neighbors the power to limit the racial composition of a community, even if all of its residents did not agree to the exclusions. Inability to gain access to suitable housing still contributes to the lack of generational wealth in the Black community, creating greater economic inequality.⁷⁶

Furthermore, other problems resulted from the inability of minorities to gain access to many housing developments because of the requirements of the Federal Housing Administration.⁷⁷ Some federal policy has actually encouraged more segregation. An example of this is a policy implemented by the Federal Housing Administration that undervalued racially mixed urban areas and made it much more difficult for property owners in these areas to refinance their mortgages.⁷⁸ Federally guaranteed loans for both the military and private citizens were restricted to Whites.⁷⁹ The effect was to create larger segregated slum areas in most cities.⁸⁰ The lack of home ownership affects community stability, a difficult trend to reverse.

When the civil unrest of the 1960s broke out, so-called "[W]hite flight" from those troubled areas brought racial segregation in urban centers into stark

73. *Shelley*, 334 U.S. at 6.

74. *Id.* at 10.

75. *Id.* at 7. This is similar to the 1934 covenant in *McGhee* (a companion case to *Shelley*), restricting the use and occupancy of the subject property in Detroit, Michigan, to "those of the Caucasian race." *Id.* at 6. The McGhee agreement specifically stated "that [the restrictive covenant] shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction." *Id.* at 7.

76. See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 1–2 (2017) (examining how unequal access to banking and capital fueled and solidified the modern wealth gap). See also KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 3–4 (2019).

77. John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 *LAW & SOC. INQUIRY* 399, 411 (2007) (describing proactive FHA segregationist policy).

78. See Mitchell E. Feldman, *Statistically Speaking: Restrictive Changes to Fair Housing Act Disparate Impact Liability*, 62 *B.C. L. REV.* 1321, 1322 n.9 (2021).

79. See *id.* at 400; Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *CORNELL L. REV.* 729, 758 n.161 (2001).

80. See Cashin, *supra* note 80, at 757.

relief.⁸¹ Shopping and other vital services fled after the unrest, never to return to the most impacted communities.

III. POLICE DISCRETION

Official police action against members of minority communities is inextricably linked to America's history of slavery.⁸² Masters wanted their servants to serve the needs of their businesses without interference or disruption. Because slaves were considered the property of their masters, and were mobile, slave catchers and patrollers were given broad discretion to punish unauthorized movement.⁸³ During the mid-1800s, when the Fugitive Slave Act was at full coercive power and literally millions of slaves were moving about, it became difficult to control the flow of enslaved people to the north who were trying to escape bondage.⁸⁴ As they reached northern cities, it was typical for them to be

81. After the riots of the 1960s, many middle-class Whites left the city. See GARY ORFIELD & JONGYEON EE, *OUR SEGREGATED CAPITAL: AN INCREASINGLY DIVERSE CITY WITH RACIALLY POLARIZED SCHOOLS* 27–28 (2017).

82. LOIS G. FORER, *CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT* 225–26 (1980). One insightful observer asserted that “[a]ny honest chronicler of American legal history must acknowledge that the legal system in its treatment of blacks has been characterized by inequality . . .” *Id.* at 226.

83. See JEFFREY R. BRACKETT, *THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY* 101 (1889). “The constables of towns, also, were usually ordered by special acts of Assembly to see, among other duties, that negroes did not gather in noisy groups in the street, or at meetings, or remain out late at night . . . Often, in towns with a considerable [B]lack population, a bell was rung at a certain hour in the evening—as nine in winter and ten in summer—and the [B]lack who were being out of doors thereafter had to rely on his own good character, or on the carelessness or good nature of the constable, or his heels, to save him from punishment.” *Id.* See also SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 110 (2001) (describing the laws that required Black slaves who traveled beyond their homes to possess slave passes: “Slave patrols frequently looked at slave passes while making their rounds. Laws required the slave to carry a pass, or ticket, from her master, which permitted the slave to leave the plantation. A specific pass stated the slave’s name, where she had permission to go, on what date, how long the pass was good for . . . and bore the owner’s signature.” (citation omitted)).

84. *Fugitive Slave*, *ENCYCLOPEDIA BRITANNICA* (Dec. 21, 2018), <https://www.britannica.com/topic/fugitive-slave>. See generally *Fugitive Slave Act of 1793*, 1 Stat. 302 (1793). “An Act respecting fugitives from justice, and persons escaping from the service of their masters . . . SEC. 4. And be it further enacted, That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given and declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any Court proper to try the same, saving moreover to the person claiming such labor or service his right of action for or on account of the said injuries, or either of them.” *Id.* at §§ 1–2, 4. The Act was approved and signed into law by President George Washington on February 12, 1793. 2 *ANNALS OF CONG.* 1414 (1793).

able to blend in among free Blacks. After the Civil War in America, and legally abolishing slavery,⁸⁵ the need to control the movement of people of African descent became greater in many ways. They had no owner, so placing them in incarceration, labor camps, or having strict discretion over their activity was seen as a way to control their movement.⁸⁶ They no longer had the legal status of property.⁸⁷ Their presence in the community, particularly in cities, led to a type of suspicion of their freedom of movement unlike that in existence during slavery when their status was more clearly defined by the law.⁸⁸

These concerns were addressed in most places by the separation rationale of Jim Crow.⁸⁹ Segregating Blacks from Whites and assuring the inferior status was the approach most often implemented in places both urban and rural.⁹⁰ For decades, this inferior status combined with the rise of public policing to create great tension between minority groups and the police. That tension was inherited by generations of urban minorities and the poor.⁹¹ Arrests and convictions often led to collateral consequences, such as inability to gain meaningful employment or enter professional training in some industries.⁹² Occasionally, the federal

85. U.S. CONST. amend. XIII, § 2.

86. See BLACKMON, *supra* note 4, at 2–3 (2008).

87. U.S. CONST. amend. XIII, § 2.

88. See Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 422 (Dec. 2009).

89. Decades after the Supreme Court decided the *Plessy* case, Jim Crow laws had influenced the laws in all public settings. The opinion “‘ha[d] pursued the negro even into prisons, wash houses in coal mines, telephone booths and the armed forces. The separation extended as well to inanimate objects’” CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 202 (1988). One provocative account of the criminal justice system in the early twentieth century involved the community of Phillips County, Arkansas, in the “Black Belt” of the South around 1919. Although more than seventy-five percent of the county’s population was Black and 18,000 of its residents were of voting age, “[n]o Negro had served on either a grand jury or a trial jury in 30 years.” LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 232 (1966).

90. See Marvin E. Wolfgang & Bernard Cohen, *Crime and Race*, in *RACIAL DISCRIMINATION IN THE UNITED STATES* 284, 287 (Thomas F. Pettigrew ed., 1975) (“In the annals of the administration of justice are many cases of improper treatment of Negroes, Puerto Ricans, Spanish-American and other minority groups. There is widespread belief that [B]lacks, particularly, are frequently subjected to illegal arrest, arrest on weak suspicion, illegal detention and corporal handling by the police. Compared to whites, they are jailed more than bailed.”).

91. Some commentators have strongly suggested that “African-American men have become fair game for police harassment whenever they travel in public, be it by plane, car, bus, train, or foot ‘[C]onsent’ and ‘free-to-leave’ doctrines prove unworkable given the racially abusive history between police and minorities.” Erika L. Johnson, *A Menace to Society: The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 634 (1995) (footnote omitted).

92. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1215 (2010). See Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 657 (2006).

government has intervened with decrees of court-ordered supervision of urban police forces because of habitual abuse of urban dwellers.⁹³ These issues, which continue to be largely unaddressed, received some attention during periods of unrest, including the civil rights movement of the 1960s after the assassination of Reverend Dr. Martin Luther King, Jr., but have produced few tangible improvements.⁹⁴

Riots and violent clashes between police resulted in several studies in an effort to resolve the issue.⁹⁵ Although civil rights legislation during the 1960s addressed some challenges, there have been few examples of improvement in urban areas with each decade that passes.⁹⁶ As we have entered the twenty-first century, protests regarding police misconduct in the death of Michael Brown in Ferguson, Missouri,⁹⁷ and others who have died under police dominion, like

93. See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3203 (2014) (acknowledging that even if the federal government resumed its role in investigating, reforming, and holding accountable local police departments, there remains a great need for state governments to address abusive policing practices). It is that very type of rationale that has led to investigations regarding controversial killings when the police have used deadly force, police forces like those in Cleveland, Ohio. See U.S. ATTY'S OFF., N.D. OHIO, INVESTIGATION OF THE CLEVELAND POLICE DIV. (2014). The Department of Justice under the Trump Administration failed to negotiate a single new consent decree, and, in one of his final acts as Attorney General, Jeff Sessions signed a memorandum virtually ending the use of consent decrees for the foreseeable future. See Memorandum from Jefferson B. Sessions, U.S. Att'y Gen., to Heads of Civ. Litig. Components, U.S. Att'ys Off. (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download>.

94. See Sarah Brady Siff, *Policing the Police: A Civil Rights Story*, ORIGINS (May 2016), <https://origins.osu.edu/article/policing-police-civil-rights-story> (discussing how police brutality has historically gone unpunished in the United States).

95. See, e.g., NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS (1968).

96. See F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA 169–70 (2013) (discussing President Lyndon B. Johnson's War on Poverty legislative plan on the structural economic and racial disparities that currently exist in our nation).

97. See, e.g., Consent Decree, *United States v. City of Ferguson*, (No. 4:16-cv-000180-CDP, E.D. Mo., Mar. 17, 2016). "A more powerful cause is the explicit intents of federal, state, and local governments to create racially segregated metropolises. The policies were mutually reinforcing In 1974, a federal appeals court concluded, 'Segregated housing in the St. Louis metropolitan area was . . . in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state, and local governments.' The Department of Justice stipulated to this truth but took no action in response. In 1980, a federal court ordered the state, county, and city governments to devise plans to integrate schools by integrating housing. Public officials ignored the order, devising only a voluntary busing plan to integrate schools, but not housing Although policies to impose segregation are no longer explicit, their effect endures. When we blame private prejudice and snobbishness for contemporary segregation, we not only whitewash history but avoid considering whether new policies might instead promote an integrated community." Richard Rothstein, *The Making of Ferguson: How Decades of Hostile Policy Created a Powder Keg*, THE AM. PROSPECT (Oct. 13, 2014), <http://prospect.org/article/making-ferguson-how-decades-hostile-policy-created-powder-keg/>.

Freddie Grey in Baltimore, Maryland,⁹⁸ and George Floyd in Minneapolis, Minnesota,⁹⁹ have created another opportunity for us to focus on the problem. Challenges regarding the constitutional protection of citizens under the Fourth Amendment have often been opposed by police.¹⁰⁰ The courts have not been very receptive in recent years to enforcing those rights.¹⁰¹ The Supreme Court of the United States in particular has backed away from its brief progressive surge of cases protecting citizens from police misconduct.¹⁰² Modern jurisprudence has, in fact, provided little hope that the broad power of police will be curtailed by the courts.¹⁰³ From strip searches for minor offenses,¹⁰⁴ to

98. Robert Koulisch, *The Databasing of Freddie Gray*, 16 UNIV. OF MD. L.J. RACE, RELIGION, GENDER & CLASS 179 (2016) (“It is an age in which police engage in racial profiling, preemptive policing, and where laws that should safeguard residents actually help to legitimize excessive police force. Such policing techniques are evident throughout Sandtown-Winchester, the Baltimore neighborhood where Freddie Gray lived and where he met his fateful end in the back of a police van. Freddie Gray’s death represents a systemic problem that is not easily addressed by the courts. Consider the police trials of three Baltimore City officers, where three officers were exonerated and charges against three others were dropped. The trials represent the limits of the law in holding police accountable for the death of one unarmed African American male in their custody.” (internal citations omitted)). Consent Decree at 1, *United States v. Police Dep’t of Balt. City*, (No. 1:17-cv-00099-JKB, D. Md. 2017) (The introduction to the Baltimore city police decree states the following: “1. The United States, the Mayor and City Council of Baltimore (‘City’) and the Police Department of Baltimore City (‘BPD’ or ‘the Department’), collectively the ‘Parties,’ are committed to effective, constitutional law enforcement.”).

99. Debra Cassens Weiss, *Death of George Floyd Brings Debate on Qualified Immunity for Police Misconduct*, ABA J. (June 2, 2020, 11:18 AM), <https://www.abajournal.com/news/article/death-of-george-floyd-brings-debate-on-qualified-immunity>.

100. The Fourth Amendment of the United States Constitution states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

101. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 32 (1995) (criticizing post-Warren Courts for balancing away too much of the Fourth Amendment’s protection).

102. See CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 201 (1978). “Repealing the so-called ‘exclusionary rule’ would not make the police any more effective in their ‘war’ against crime. Despite loud and frequent complaints, the police have not been handcuffed by the rulings of the Warren Court. Except for minor drug offenses, there is no evidence to suggest that policemen make fewer arrests, or that prosecutors secure fewer convictions, because of the Supreme Court decisions safeguarding the rights of the accused; on the contrary, the evidence runs the other way” (footnote omitted). *Id.*

103. *Id.*

104. See ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY 6 (1995) (recounting police abuses in search and seizure including the policy of the Chicago police “to take people to the lockup for even trivial traffic violations” and to perform strip searches for minor traffic offenses).

the use of deadly force,¹⁰⁵ there have been few serious efforts to remove race discrimination from policing.¹⁰⁶ For decades, Black men have been shot and killed by police. These tragedies have raised awareness of racism in policing.¹⁰⁷ Few people in the urban setting have any constitutional protection when traveling in vehicles, where many deadly police encounters take place.¹⁰⁸ Indeed, implicit bias in policing continues to be perpetuated many years after the fall of the legal regime of “Jim Crow.”¹⁰⁹

IV. SOLUTIONS AND RECOMMENDATIONS

Living in a city should not mean you surrender a fundamental right to dignity. I agree with those who argue that health care, education, and housing

105. Police accountability should be understood as a system of structures that help to shape the conduct of both individual officers and police departments for compliance with standards of practice that respect the constitutional rights of individuals. It has been observed that the user of deadly force in a police department had more to do with the police chiefs’ philosophy than with rates of crime or violence. See Gerald F. Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L. REV. 15 (1973).

106. Another critic of the inequality in the criminal justice system has surmised that “[t]he racial divide is attributable, at bottom, to the criminal justice system’s pervasive reliance on double standards. While criminal justice is explicitly based on the promise of equality before the law, the administration of criminal law from the officer on the beat to state legislators to the Supreme Court -is in fact predicated on the exploitation of inequality.” David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. 2 (1999).

107. The tensions between minorities and police have not diminished despite recent gains in civil rights. Events like the New York police shooting of a Black man forty-one times during a street encounter suggest that the racial issues are still present. As famed writer and lawyer Scott Turow recently stated, “I find it hard to imagine the police shooting 41 times at a [W]hite man in a middle-class area standing peaceably in his doorway.” Scott Turow, *You Think You Know Why the Diallo Cops Were Acquitted. Think Again.*, WASH. POST (Mar. 5, 2000), <https://www.washingtonpost.com/wp-srv/WPcap/2000-03/05/109r-030500-idx.html>.

108. See David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 557 (1998) (discussing the Supreme Court’s trend for decades of “steadily increasing police power and discretion over cars and their occupants” and stating that “the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it”).

109. One insightful scholar wrote that “social science data reflect[s] [that] the Court has underestimated the extent to which racial factors affected an individual officer’s perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure.” Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1012 (1999). Some scholars have suggested that the war on drugs has simply been a war on Black and Brown urban communities. See generally Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ Was a ‘War on Blacks’*, 6 J. GENDER RACE & JUST. 381 (2002) (describing the history of the heroin epidemic of the 1960s and 1970s, and the crack cocaine epidemic of the 1980s and 1990s, resulting in disproportionate involvement of Blacks in the criminal justice system).

should be counted among our fundamental rights.¹¹⁰ Clearly, the start of the solution lies in taking a therapeutic justice approach. In restorative justice principles, the focus of the process is on healing, rather than finding a way to treat all violators of law as traditional criminal offenders.¹¹¹ While there has been some system reform in recent years to incorporate trauma-informed practices, courts and government agencies need to move toward factoring urban trauma into their solutions.¹¹² Even lawyers in the system should take a therapeutic justice approach leaning toward fashioning health care rather than criminal justice outcomes.¹¹³

Further, a model of community policing should be advanced to change the trust relationship in urban settings. This style of policing diverts from the orthodox model, which stresses officers not backing down from confrontations and evaluates officers more on the numbers of arrests. Instead, the community policing model emphasizes community engagement, limited use of force, the application of new technology, and reliance on independent oversight and cooperative efforts with community groups.

Such an approach might have its critics, but police agencies “were more effective over time when [they] were able to recruit new officers who had a particular affinity for the type of policing we were promoting. Plus, there were certain individuals who changed their philosophies toward modern policing.”¹¹⁴

“Done correctly, policing is among the noblest of professions. But done incorrectly, it can be a societal poison ‘[A]nti-progressive orthodoxy’ model of policing still dominates in America ‘and rears its head in examples such as what we’ve just seen [with George Floyd].’”¹¹⁵ We should take this window of opportunity to both admit our errors and repair our past failure to address our neglect of the people in urban America. Lack of access to affordable, equitable healthcare has shown disparities in COVID-19 mortality in urban

110. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 207, 210 (2008) (arguing that the Supreme Court should weigh societal values in relation to public welfare benefits when it determines whether there should be fundamental rights to education, housing, or medical care).

111. John Brathwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

112. See, e.g., *Trauma Informed Care System*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/our-work/trauma-informed-system-care> (last visited June 26, 2021) (listing the ten key principles juvenile court judges should know about trauma).

113. See, e.g., Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 965–66 (2007); Lynda Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protecting Strategies*, 24 SEATTLE U. L. REV. 483, 484 (2000).

114. News Release, U. of Alb. News Ctr., Wiley Ends 24-year Career as UPD Chief, But Teaching and Legacy Go On (June 2, 2020), <https://www.albany.edu/news/93957.php>

115. *Id.*

communities, specifically for communities of color.¹¹⁶ In addition, seemingly simple public health solutions to the pandemic, like social distancing, neglect the realities of low-income Americans being more likely to work in public-facing jobs and live in multi-generational households.¹¹⁷ We are all spectators to the tragedy of the failure of the American city. However, unlike the citizens of Greece, we are in the position to move past our own catharsis¹¹⁸ in response to the woes of the urban poor. We can provide material resources in addition to holistic public policy efforts to benefit the lives of our most underprivileged.

V. CONCLUSION

The nation's urban centers have had a disproportionate share of poverty and health related issues.¹¹⁹ At the same time, our society operates under the delusion that more incarceration in urban areas will make us safer.¹²⁰ Changing from a rural society to an industrial society has concentrated both opportunity and suffering in American cities.¹²¹ Attempts to address these issues have been ongoing, however, minority groups have done a disproportionate amount of suffering as we attempt to resolve these problems. For example, Baltimore's attempt to begin trauma-informed practices¹²² is an appropriate start but the minority community still has disproportionate suffering from the opioid crisis.¹²³ Exacerbated by the great migration of African-Americans escaping the Jim Crow South, the cities have absorbed a large amount of the people with the

116. Leana S. Wen & Nakisa B. Sadeghi, *Addressing Racial Health Disparities in the COVID-19 Pandemic: Immediate and Long-Term Policy Solutions*, HEALTH AFF. BLOG (July 20, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200716.620294/full>.

117. Tabia Henry Akintobi et al., *Community Engagement of African Americans in the Era of COVID-19: Considerations, Challenges, Implications, and Recommendations for Public Health*, PREVENTING CHRONIC DISEASE, Aug. 2020, at 1.

118. A priority of the creators of the Greek dramas was to provide a sense of catharsis, the sometimes violent expungement of negative emotions, to the populace of Greece. *The Different Types of Greek Drama and Their Importance*, PBS, <https://www.pbs.org/empires/thegreeks/background/24c.html> (last visited June 26, 2020).

119. See Deborah N. Archer & Tamara Belinfanti, *We Built It and They Did Not Come: Using New Governance Theory in the Fight for Food Justice in Low-Income Communities of Color*, 15 SEATTLE J. SOC. JUST. 307, 312 (2016) (identifying food insecurity as a major health concern and "that true access should include both physical access (in short, proximity) and cultural access").

120. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. 1 (2017), <https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer> [<https://perma.cc/5TBR-WSDC>].

121. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT MIGRATION AND HOW IT CHANGED AMERICA* 6 (1992).

122. *Supra*, Section II.

123. Brian Mann, *Drug Overdose Deaths Surge among Black Americans During Pandemic*, NPR (Mar. 3, 2021, 5:00 PM), <https://www.npr.org/2021/03/03/970964576/drug-overdose-deaths-surge-among-black-americans-during-pandemic>.

greatest health care and mental health needs.¹²⁴ Jim Crow housing practices slowed the possibility of progress for many members of minority groups through the middle of the twentieth century.¹²⁵ These practices affect both educational opportunity and access to other services taken for granted by members of the majority community.¹²⁶

The opioid crisis of the early twenty-first century,¹²⁷ and the more recent COVID-19 pandemic, has magnified the challenges of major cities in ways that have never been contemplated.¹²⁸ Despite these dire circumstances, this crisis may have led to a possibility that we could reset our focus and not repeat our “War on Drugs” mistake of the past. America’s African American community has remained stuck for the last five decades in both housing and incarceration discrimination.¹²⁹ Re-directing drug abuse through the healthcare system rather than the criminal system makes sense from an economic and public policy perspective. Recognizing these systemic barriers to equality should be a top priority for a nation such as America, which prides itself on valuing equal opportunity. A focus on workforce development and offender reentry is a

124. *See id.* Research shows that “African-American males are also less than half as likely to receive consideration by employers as their White counterparts. Pager also found that criminal convictions were less problematic for the White participants. The White males who reported that they were just out of prison were as likely to be called back for a second interview as African-American men who had no criminal history at all. Among African-American males without criminal records, only 14% received call-backs compared to 34% of their White non-criminal counterparts. White men with criminal records received more favorable treatment (17%) compared to African-American males without (14%). Criminal records for African-American men are interrelated to the criminal justice system and difficult to overcome due to the convictions reinforcing longstanding stereotypes of African-American men.” Evi Taylor et al., *The Historical Perspectives of Stereotypes on African-American Males*, 4 J. HUM. RTS. & SOC. WORK 213, 217 (2019).

125. *See, e.g.*, ANTERO PIETILLA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 144 (2010).

126. *See id.* at 154.

127. *See* Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL’Y REV. 463, 464–77 (2017) (providing a brief history of the emergence of the opioid epidemic); Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182 (suggesting that the epidemic has “roots . . . [that are] deeper than popular narrative suggests”).

128. *See generally* Taled El-Sabawi, *Carrots, Sticks, and Problem Drug Use: Law Enforcement’s Contribution to the Policy Discourse on Drug Use and the Opioid Crisis*, 80 OHIO ST. L.J. 765, 781 (2019) (presenting evidence of confusion caused by law enforcement groups using the rhetorical narrative-making process to remain in control of public health problems by inserting themselves into public health proposals).

129. Tracy Jan, *Report: No Progress for African Americans on Homeownership, Unemployment and Incarceration in 50 Years*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/26/report-no-progress-for-african-americans-on-homeownership-unemployment-and-incarceration-in-50-years/?utm_term=.357d99068f25.

valuable tool in the fight to change direction from a system hard wired with incarceration priority.¹³⁰

We should not double down on failed approaches that place only a Band-Aid on the problem and leave the nation exactly where we've been for the last several decades.¹³¹ We should use this crisis as an opportunity to reset and launch new initiatives that have some chance of success.¹³² In many ways, all of these tragedies combined have placed us at rock-bottom. What do we have to lose by trying something new.¹³³

130. *E.g.*, Press Release, Larry Hogan, Governor of Maryland, Governor Hogan Announces Maryland Selected for Workforce Development Pilot Program to Combat Opioid Epidemic (Aug. 28, 2020), <https://www.dllr.state.md.us/whatsnews/opioidcombatpilot.shtml> (providing an example of an initiative to incorporate job training and recovery services with the purpose of aiding in recovery from the opioid epidemic).

131. *See* Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 613–14 (2020) (coining “unnecessary incarceration” as “a phrase to define a category of accused individuals who spend a prolonged period of time incarcerated prior to trial and who will later be cleared of all charges”).

132. *See, e.g.*, Alexandra Maul, *State and Federal Support of Trauma-Informed Care: Sustaining the Momentum*, CTRS. FOR HEALTH CARE STRATEGIES (Sept. 27, 2017), <https://www.chcs.org/state-federal-support-trauma-informed-care-sustaining-momentum/> (stating the primary goals of the legislation are to increase understanding and awareness of trauma and to identify best practices for prevention and treatment. While the bill has received significant support, it did not pass. Mike Gallagher (R-WI) and Danny Davis (D-IL) introduced the Recognizing the Importance and Effectiveness of Trauma-Informed Care Act (H.Res.443) in July 2017 with a goal of increasing awareness and encouraging the use of trauma-informed approaches among existing programs and agencies at the federal level.); Press Release, Lisa Murkowski, U.S. Senator for Alaska, Durbin, Capito, Colleagues Introduce Bipartisan, Bicameral Legislation to Address Childhood Trauma (June 11, 2019), <https://www.murkowski.senate.gov/press/release/durbin-capito-colleagues-introduce-bipartisan-bicameral-legislation-to-address-childhood-trauma> (demonstrating the primary goals of this legislation are to: increase funding for mental health clinicians, hospital-based trauma interventions, and community-based coalitions; enhance federal training programs at HHS and the Department of Education to ensure that there are more tools for professionals who interact with youth and families; improve the monitoring and enforcement of health insurance parity requirements for coverage of infant and early childhood mental health services; and strengthen the AmeriCorps program to prioritize recruitment in communities that have experienced trauma).

133. I do not mean to be arguing against the necessity and difficulty of good policing. It has been long recognized that “police are called upon to provide a wide variety of social services as well They rush accident victims to the hospital; bring alcoholics indoors on cold winter’s night; break into a locked house or apartment to see whether an elderly occupant is alive or well; persuade a mentally ill person who has barricaded himself in his apartment to return to the hospital; administer emergency first-aid to a heart attack victim, or someone has taken a drug overdose” CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 203 (1978).